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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

WILLIAM DLUBAK, as POLICE SERGEANT OF THE CITY OF NEW KENSINGTON, and CITY OF NEW KENSINGTON,

Petitioners,

vs.

MAMIE HORTON, as Administratrix of the Estate of Douglas Powdrill, Deceased,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THIS CASE INVOLVES CONDUCT MORE CULPABLE THAN NEGLIGENCE

In Daniels v. Williams, 474 U.S., 327 (1986) and Davidson v. Cannon, 474 U.S. 344 (1986), this Court held that the due process clause of the 14th Amendment is not violated through negligent conduct. Even though this case involves conduct more culpable than negligence, the Petition for Certiorari of the City of New Kensington and William Dlubak has framed the Questions Presented for Review in terms of a "negligent deprivation" and "negligent omissions". The facts of the case adduced at trial, in the light most favorable to Respondent Mamie Horton, (See, e.g., Berndt v. Kaiser Aluminum &

Chemical Sales Inc., 789 F.2d 253 (3rd Cir. 1986)) are set forth below.

Early in the afternoon on November 10, 1982, New Kensington Police Detective Sergeant Dlubak (Det. Dlubak hereinafter), while on duty, received a radio call from the police dispatcher informing Det. Dlubak that Charles "Pope" Flenory, Jr. (Pope hereinafter), wanted to speak to Det. Dlubak, at a private club known as the Cash Club. (A. 974, L. 18-21). Pope was the manager of the Cash Club. (A. 974. L. 18-21). Det. Dlubak had known Pope all the Pope's life. (A. 134, L. 10-11). Pope was also a retired New Kensington police officer who had

worked with Det. Dlubak. Pope had retired in October of 1981 after being a New Kensington Police Officer for approximately 18 years. (A. 791-794).

Pope, when he telephoned for Det. Dlubak to come to the Club, was in the process of investigating a burglary which had occurred days earlier at the Cash Club. Phonograph records owned by Club disc jockeys were among the stolen property. (A. 822, L. 5-18). Pope had Douglas Powdrill (Powdrill hereinafter) a casual employee of the private club whom Pope suspected of involvement in the burglary, at the Club for questioning. (A. 977, L. 5-9) Pope wanted Det. Dlubak, his friend and ex-coworker, to "scare" Powdrill into talking. (A. 858, L. 18-19).

Det. Dlubak, upon approaching the Club, saw Everhardt Flenory, Pope's brother, whom Det. Dlubak knew had in the past been arrested on drug and firearms related charges. (A. 973, L. 18-25; A. 974 L. 1-7). Det. Dlubak, at this time, also must have known about Pope and Pope's relatives' reputations for beating people up.* Also, the Cash Club had a

* Fellow police officer Harvey testified that Pope had a reputation for beating people up. (A. 273, L. 1-23). Patrick stated that the Flenory's had a reputation for being ruffians, bullies and people likely to resort to physical violence (A. 96, L. 5-18), and that the Cash Club had a bad reputation. (A. 95, L. 21-25; A. 86, L. 1-4). Sherry Coover stated that Pope and his son, Chinky, had a reputation for beating up people. (A. 637, L. 2-7). Also, 15 witnesses testified about violent incidents involving Pope and/or his relatives which were reduced to written police incident reports which Det. Dlubak in his official capacity, had read (A. 960, L. 11-12), and, therefore, Det. Dlubak had to have known of the specific incidents of violence plus Pope's reputation, his relatives' reputation and the Club's reputation.

reputation as a place where many unlawful beatings occurred. Det. Dlubak previously had investigated an incident in which Pope beat and robbed a woman at the Cash Club causing her to be hospitalized for 4 to 5 days. (A. 1114, L. 12-25; A. 1121-1122). An article appeared in the local newspaper about a man Pope had beaten with a black jack, while acting as a New Kensington Police Officer. (A. 270-278).

Inside the Club, dimly lit and not open for business, (it was an "after hours" Club that did not open for business until late at night), Det. Dlubak saw Keith Turner, Chico Rivera, Chinky Flenory (Pope's son), Pope, Powdrill and shadows made by unknown people moving around in the background. (A. 976, L. 7-12; A. 1007, L. 5; A. 1009,

L. 16-22; A. 988, L. 13-20).

As Det. Dlubak started to enter the Club, Powdrill was being beaten up by Ronald DeVaughn. DeVaughn, one of the disc jockeys whose albums were stolen in the burglary (A. 702, L. 16-21), was instructed by others in the Club to stop beating Powdrill at the moment Dlubak was entering the Club. (A. 708, L. 7-21).

Pope and Det. Dlubak spoke. Det. Dlubak thereupon introduced himself to Powdrill as a police officer and questioned Powdrill about the burglary. (A. 976, L. 25; A. 977).

Det. Dlubak witnessed that Powdrill, who had just been in a fight with DeVaughn, had tears in his eyes (A. 980, L. 1-2) and was pleading with Pope. (A. 979, L. 24-25). Pope acknowledged in his testimony that Powdrill was frightened

(A. 861, L.24), shook (A. 861, L. 11-12) and looked distressed and shaken. (A. 863, Ll. 9-13). During the interrogation, this scared, crying and pleading young man, Powdrill, asked Det. Dlubak to take him out of the Club. (A. 133, L. 13-15). Instead of taking Powdrill from the Club, Det. Dlubak left the Club, and just before leaving told Pope: "I guess you can take care of this yourself. I guess you can handle this." (A. 707, L. 9-12).

Det. Dlubak explained to the jury why he failed to take Powdrill from the Club: "Because I am talking to an ex-policeman, and I worked with for 14 years, and I know quite well, and I figure that Mr. Powdrill is in good hands." (A. 981, L. 16-18). Det. Dlubak told Pope to get and talk to Bartender Milton Patrick because

Mr. Patrick may have had keys to the Club. (A. 863, L. 16-24; A. 988-990). Pope told Det. Dlubak that he did not want a written police report about the burglary filed, and, therefore, Det. Dlubak suggested that Pope investigate the burglary alone, without further police involvement. (A. 983, L. 9-17). This was an improper delegation of police duties and responsibilities to a private citizen. (A. 431, L. 14-25; A. 432, L. 1-12). Det. Dlubak wrongfully failed to file a written report as required by law (A. 431, L. 14-25; A. 432, L. 1-12; A. 925, L. 1-15), and wrongfully failed to follow up on the case as is required by regular police procedure. (A. 981, L. 25; A. 982, L. 1-9; A. 985, L. 6-25; A. 986, L. 1-21).

Det. Dlubak has been a detective

since 1970 with extensive training including a 480 hour basic municipal police course and 28 to 30 seminars on topics such as burglary investigation. (A. 958-964).

Upon Det. Dlubak leaving the private club, Pope threw up his hands in a manner interpreted by DeVaughn to mean, "I don't care what youns do to him now to get your albums back." At Pope's direction, DeVaughn and subsequently others brutally beat Powdrill for over 2 hours using baseball bats, iron rods, fists and feet, and interrogated Powdrill about the burglary and the stolen albums. Approximately one-half hour after Det. Dlubak left the Club, Chinky Flenory, Chico Rivera and Keith Turner took Milton Patrick from his home and brought him to the Cash Club, where he was similarly

beaten and interrogated. (A. 100-111). The injuries sustained by Powdrill in the beating resulted in his death later that night. (A. 131, L. 25; A. 132, L. 1-24).

These beatings occurred in the middle of the afternoon on a normal business day within the confines of the Central business district of the City of New Kensington. The New Kensington Police Substation was located on the same street as the Cash Club and less than a block away. Two individuals, one of whom was Powdrill's nephew, entered the Club near the end of the beatings and saw Powdrill and the serious condition he was in. The two individuals left the Club and saw New Kensington Police Officer Robert Kowalkowski (Off. Kowalkowski hereinafter) near the Police Substation. Powdrills's nephew informed Off.

Kowalkowski that he needed assistance at the Club, "his uncle had been beat up bad." (A. 654, L. 17-19). Off. Kowalkowski and New Kensington Police Lieutenant Joseph Mangione (Lt. Mangione hereinafter) then went to the building which housed the Cash Club. Ronald DeVaughn was standing just outside the Club with blood on his shirt and pants that was plainly visible. (A. 661, L. 19-25). Off. Kowalkowski and Lt. Mangione went into the building and rang the buzzer at the entry to the Club. Pope opened the door exposing a white wall with blood on it. (A. 105-106). Off. Kowalkowski and Lt. Mangione mentioned to Pope a report of a beating there. (A. 875, L. 13-15). Pope responded that the beating was over. (A. 875, L. 15-16). Off. Kowalkowski and Lt.

Mangione made no further inquiry. They exited the building, passing Powdrill's nephew on their way out without saying a word to him. (A. 657). About one-half hour later, Powdrill was carried from the Cash Club and taken to the Hospital by his nephew and others.

Thus, there was substantial evidence presented at trial of conduct more culpable than negligence. In addition, the trial court's charge prohibited the jury from finding liability premised on negligence:

> You may not find an individual defendant liable if you conclude that his conduct was negligent. The law does not permit a plaintiff to recover for a violation of a constitutional right which was the result of negligent conduct. (A. 589).

In reviewing this case, the United

States Court of Appeals for the Third Circuit denied oral argument and issued a very short Memorandum Opinion, not for publication, authored by Chief Gibbons that affirmed the Trial Court. The Third Circuit found that "Dlubak could reasonably foresee serious harm befalling Powdrill." (A-3). Neither the City of New Kensington or Officer Dlubak requested a rehearing.

II. THIS COURT HAS PREVIOUSLY DECIDED THAT, IN SOME CASES, THERE IS A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983 FOR FAILURE TO PROTECT

Petitioners argue that this Court has not yet decided whether a law enforcement official's failure to act to prevent a crime can state a claim under 42 U.S.C. Section 1983. However, in Martinez v.

California, 444 U.S. 277, 284-285 (1980) this Court determined that a cause of action for failure to protect is possible in some cases. In Martinez the Court rejected the Section 1983 claim of the family of a 15 year old girl murdered by a parolee. The girl's family had sued the state officials who paroled him 5 months before her murder. This Court found the girl's death "too remote a consequence of the parole officer's action to hold them responsible under federal civil rights law," but indicated the result could have been different if the parole board were aware that this girl, "as distinguished from the public in general, faced any special danger." 444 U.S. 277, 284-285. The Third Circuit determined that Det. Dlubak was aware that Douglas Powdrill faced a special

danger.

III. NEITHER THE SPECIAL RELATIONSHIP OR THE NEGLIGENCE ARGUMENTS OF PETIONERS WERE RAISED BEFORE THE COURT BELOW

the Brief filed by the Petitioners in the United States Court of Appeals for the Third Circuit, only two issues were raised. First, the Petitioners argued that the "prevailing view" required proof of a "special relationship" (as defined in Estate of Bailey v. County of York, 768 F.2d 503 (3rd Cir. 1985)) between Douglas Powdrill and the New Kensington Police. Since the Third Circuit found that such a special relationship was proven, the Petitioners have now switched the argument in the Petition for Writ of Certiorari to raise, for the first time, the claim that the special relationship

test is improper (See Petition for Writ of Certiorari, pages 12 and 13).

The second issue raised before the Third Circuit was a claim of insufficient evidence that the policy of nonenforcement of the laws in private clubs caused the death of Douglas Powdrill. Another issue Petitioners now seek to raise, that the conduct of Det. Dlubak amounted only to negligence, was not argued to the Third Circuit.

IV. THIS IS NOT A "FAILURE TO RESPOND" OR A "FAILURE TO PROVIDE ADEQUATE POLICE PROTECTION" CASE

It is argued in the Petition for Writ of Certiorari that the Third Circuit's decision in this case would allow "a victim who identifies himself in a hurried call to a distant police station

[to set] the stage for recovery when the police do not timely respond to his call for help." PETITION FOR WRIT OF CERTIORARI, p. 13. The instant case, however, is not a case where police failed to timely respond to a call. Det. Dlubak responded to the call by going to the Cash Club, "could reasonably foresee serious harm befalling Powdrill "(A-3), but nevertheless walked out of the Cash Club without caring what would happen to Mr. Powdrill.

The Petitioners also attempt to equate this case with those where the victim is a member of the general public injured because of an alleged policy of inadequate police protection (See, e.g., Reiff v. City of Philadelphia, 471 F. Supp. 1262 (E.D. Pa. 1979) cited at Pages 10 and 11 of the Petition for Writ of

Certiorari). However, Powdrill was not just a member of the general public. Det. Dlubak knew he faced a "special danger" under Martinez v. California, supra in the "good hands" of "Pope" Flenory and his gang. Even under the narrow view taken by the United States Court of Appeals exemplified by DeShaney v. Winnebago County Department of Social Services, 812 F.2d 298 (7th Cir. 1987), cert. granted, ------U.S.------, 108 S.Ct. 1218 (1988), this case would withstand scrutiny. The Seventh Circuit requires proof that the Defendant's conduct increased the probability of the victim's injuries. 812 F.2d 298, 302. In the case at bar, the conduct of the City of New Kensington and Det. Dlubak increased the probability of Douglas Powdrill's injuries in at least two ways.

Under New Kensington policy, if there was a disturbance in a private club, the police did not enter into those clubs (A. 916, L. 6-10); private clubs were to handle their own disturbances, like a fight or something, and only if it came onto the public street would the police take charge. (A. 917, L. 20-25). (Remember, at the time Det. Dlubak entered the Club he did so because he had been summoned by Pope to talk, not for the purpose of investigating a burglary). When people were beaten in private clubs in New Kensington on various occasions and reported the incidents to the New Kensington Police, they never heard from the New Kensington Police again. (A. 34-42; A. 227-231; A. 301-302; A. 308-309). As a result, private club operators, such as Pope

Flenory, and their employees, beat people freely without fear of prosecution. Hence, the increase in the probability of Douglas Powdrill being injured.

Second, Det. Dlubak increased the probability of Powdrill's injuries by leaving him in Pope's custody with instructions to Pope to take care of the situation himself. Under the circumstances, such a direction was tantamount to authorization to continue the beating of Powdrill.

V. THE THIRD CIRCUIT'S DECISION IS NOT IN CONFLICT WITH ANY OTHER CIRCUIT

After stating in the Brief filed in the United States Court of Appeals for the Third Circuit that the Third Circuit's special relationship test was

"the prevailing view," Petitioners now argue that its application to the case at bar has created a conflict among the circuits. PETITION FOR WRIT OF CERTIORARI, Pages 9 through 13. Petitioners attempt to compare this case to Escamilla v. City of Santa Ana, 796 F. 2d 266 (9th Cir. 1986). In that case, the Court dismissed a claim that a woman's shooting death in a bar resulted from the failure of two undercover police to intercede in a fight between two other bar patrons. However, unlike Dlubak, the two police in Escamilla did not just leave the bar when trouble was imminent. They radioed for uniformed backup assistance. In addition, the victim in Escamilla had not been questioned by the police and had not asked for them to take her from the bar.

Most of the Circuit Courts of Appeal that have addressed the issue have adopted the special relationship test to some degree. See, e.g., Doe v. New York Department of Social Services, 649 F.2d 134 (2d Cir. 1981) cert. denied, 464 U.S. 864 (1983); Jensen v. Custis, 747 F.2d 186 (4th Cir. 1984); Escamilla v. City of Santa Ana, 796 F.2d 266 (9th Cir. 1986); Humann v. Wilson, 696 F.2d 783 (10th Cir. 1983); Wright v. City of Ozark, 715 F.2d 1513 (11th Cir. 1983). It is only the Seventh Circuit, in DeShaney, that has rejected the special relationship test. The Seventh Circuit requires proof that the conduct in question increased the risk of the injuries ultimately sustained by the victim. 812 F.2d 298, 302. As has already been pointed out above, the conduct of the City of New Kensington and

Det. Dlubak did increase the risk of Powdrill being injured. In addition, the Trial Court's charge to the jury that the conduct must be a "substantial factor" in bringing about the injury (A. 589), removed any possibility that the risk of injury to Powdrill was not increased by the conduct of the Petitioners.

VI. THERE IS SUBSTANTIAL EVIDENCE OF THE REQUISITE CAUSAL CONNECTION BETWEEN THE POLICY AND THE DEPRIVATION

In their Petition for Writ of Certiorari, the Petitioners argue that this Court should use this case to clarify the necessary causal connection between the policy and the deprivation. PETITION FOR WRIT OF CERTIORARI, Pages 14 through 17. However, Petitioners acknowledge and do not object to the well-accepted rule requiring proof that

the constitutionally offensive acts are taken in furtherance of the policy. PETITION FOR WRIT OF CERTIORARI. Page 15.

There is abundant evidence that the actions of Det. Dlubak were in furtherance of the policy of disregarding violence in private clubs. Det. Dlubak, instead of questioning bartender Milton Patrick himself, had Pope do it, and had Pope otherwise handle the investigation. (A. 707, L. 9-12; A. 863, L. 16-24; A. 988-990). Det. Dlubak, upon request of the operator of the private club, Pope, did not make a police report of the burglary there. (A. 983, L. 9-17). Mamie Horton produced expert testimony that these were not proper police practices. A. 426-432). Det. Dlubak admitted that the New Kensington Police

did not like to go into private clubs, and that he did not know whether arrests in private clubs were valid. (A. 969, L. 1-9; A. 970 L. 11-15). Fellow Officer Veltri testified that the City of New Kensington Police Manual, with the policy stating that arrests in private clubs are invalid, meant that if there were a disturbance in a private club, the police did not enter into those clubs (A. 916, L. 6-10). Officers Mangione and Kowalkowski, after being informed Powdrill had been beat up in the Cash Club, after seeing a man just outside the club with blood on his shirt and pants, and after seeing blood on the wall just inside the Club, failed to enter the Club or take any action. (A. 654, 661, 105-106, 875, 657). Finally, several witnesses testified to having been beaten

in private clubs, reporting the incidents to the New Kensington Police, and then never hearing from them. (A. 34-42; A. 227-231; A. 301-302; A. 308-309).

The Petition for Writ of Certiorari points out that Det. Dlubank denied his conduct was affected by the Cash Club being a private club. PETITION FOR WRIT OF CERTIORARI, Page 16. However, if an admission of the actor were required as proof that his actions were taken in furtherance of a particular policy, the resultant burden would be almost impossible. This statement by Dlubak that his conduct was unaffected by the Cash Club being private is totally self-serving (in that it goes directly to the issue of liability of his employer). It was within the province of the jury to determine whether Det. Dlubak

was telling the truth.

The City and Det. Dlubak attempt to analogize the case at bar to Milligan v. City of Newport News. 743 F.2d 227 (4th Cir. 1984). In that case, unlike the case at bar, the policy pleaded by the Plaintiff was inadequate police training. The U.S. Supreme Court has questioned whether inadequate police training can be a policy or custom under 42 U.S.C. Section 1983. City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985). The problem with establishing the causal link between police actions and a policy of inadequate training in Milligan is that such a policy does not direct a police officer to take or not take specific action (in Milligan police negligently moved an automobile accident victim's body thereby exacerbating a spinal injury

suffered in the accident). In the case at bar, however, the policy specifically directed police to not arrest in private clubs, to stay away from private clubs and to not intercede in fights occurring in them.

As the Court in Milligan stated, the policy "must be of such a character that municipal employees could reasonably infer from it tacit approval of the conduct in issue." 743 F.2d at 230. Dlubak's conduct in leaving the private club with Powdrill's beating imminent was tacitly approved by the policy that directed police to not arrest in private clubs, to stay away from private clubs and to not intercede in fights in them. The jury properly found that Det. Dlubak's acts were taken in furtherance of this Municipal Policy.

VII. LIABILITY OF A PERSON IN AN OFFICIAL CAPACITY WITHOUT LIABILITY IN AN INDIVIDUAL CAPACITY DOES NOT CREATE A CONFLICT WITH PRIOR CASES

The jury determined that the City of New Kensington and Det. Dlubak, in his official capacity, were liable to Ms. Horton for $65,899.00. The jury found that Det. Dlubak was not liable to Ms. Horton in his individual capacity. Petitioners argue that these jury findings conflict with prior cases such as City of Los Angeles v. Heller, 475 U.S. 796 (1986). In City of Los Angeles v. Heller, this Court held that, because the jury found that the police officer involved did not use excessive force, the Municipality's policy authorizing use of excessive force was irrelevant. The case

at bar is far different. Because the jury found Det. Dlubak left the Cash Club when he could reasonably foresee serious harm befalling Powdrill, the issue of whether such inaction was in furtherance of the Municipal policy of not interceding in violence at private clubs was properly submitted to the jury.

CONCLUSION

The facts of this case, when viewed in the proper manner, and taken together with the applicable law demonstrate that this is not an appropriate case for granting Certiorari. It is not a case where liability under Section 1983 was premised on negligent conduct. The issue of whether there can be a cause of action under Section 1983 for failure to protect

has previously been answered in the affirmative by this Court. The Petitioners did not raise before the Third Circuit two arguments raised in the Petition for Certiorari, the impropriety of the special relationship test and the claim that Det. Dlubak's conduct only amounted to negligence. The facts of this case show it is neither a failure to respond or a failure to provide adequate police protection case. The decision of the Third Circuit in this case does not conflict with any other circuit. There was substantial evidence that the policy of nonintervention into beatings at private clubs caused Douglas Powdrill's death. Finally, the imposition of liability upon Det. Dlubak in an official capacity but not in an individual capacity does not conflict with any prior

cases.

The rulings of the United States District Court for Western District of Pennsylvania and Third Circuit Court of Appeals were correct. They should be left standing through denial of Certiorari.

Respectfully submitted:

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